No. 14-1457

IN THE

Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Montana

BRIEF OF INDIANA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MAINE, MICHIGAN, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Sixth Amendment's Speedy Trial Clause apply to the sentencing phase of a criminal prosecution?

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INTEREST OF *AMICI* STATES

This case squarely presents the question whether the requirements of the Speedy Trial Clause extend to sentencing proceedings. *Amici* States, in their role as guardians of public safety, have a substantial interest in the answer. The "only possible remedy" for a speedy trial violation is dismissal of all charges. *Strunk v. United States*, 412 U.S. 434, 440 (1973). Thus, if the Court holds that the Speedy Trial Clause applies to sentencing proceedings, many validly convicted offenders will escape punishment on a bare showing of delay, as a speedy trial violation does not require a showing of actual prejudice. Such a windfall for criminals—immediate release without serving any sentence or completing any rehabilitative programs—amounts to a *de facto* acquittal. *Amici* States urge the Court not to essentially overturn otherwise final convictions based merely on non-prejudicial post-trial errors.

SUMMARY OF THE ARGUMENT

Historical, doctrinal, and pragmatic factors all demonstrate that the Due Process Clause, not the Speedy Trial Clause, safeguards the interests of convicted criminals in timely sentencing.

When the Sixth Amendment was adopted, the term "trial" was understood to include only the accusatory portion of a criminal proceeding that led to a determination of guilt. Sentencing proceedings followed and were often *pro forma*, as judges had little discretion to deviate from prescribed punishments.

It is not necessary to broaden that definition today; those already convicted of a crime at trial perforce do not have the same speedy *trial* interests as those who merely stand accused of a crime. Once the presumption of innocence has been rebutted, there is no longer any danger of oppressive pretrial incarceration, no anxiety of being accused, and no possibility that exculpatory evidence will be lost. *See Doggett v. United States*, 505 U.S. 647, 654 (1992) (listing those as the harms addressed by the Speedy Trial Clause) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

What is more, the harsh remedy for a speedy trial violation—dismissal of the charges—is manifestly inappropriate after a defendant has actually been convicted. At that point, it is the Due Process Clause that protects a convict's interests in timely sentencing through a more tailored remedy.

Finally, two practical realities of our modern criminal justice system render extension of the Speedy Trial Clause to sentencing particularly problematic. First, there are sometimes good reasons why sentencing does not occur immediately after the conviction; for example, a court may order resentencing many years later as a result of a direct appeal or collateral review. In such cases, a convict should have to show that the delay was prejudicial—which the Speedy Trial Clause does not require—as a prerequisite to relief. Second, States already ensure prompt sentencing through the federal Due Process Clause and numerous state constitutional and statutory protections specifically designed to

protect convicts' interest in timely sentencing. Hence, the Court need not expand the Speedy Trial Clause beyond its original boundaries and thereby permit some offenders to use it as a sword to attack their convictions rather than as a shield against injustice.

ARGUMENT

I. The Speedy Trial Clause Was Not Intended to Protect, and Is Ill-Suited to Protect, the Interest in Timely Sentencing

A. The original understanding of "trial" included only determinations of guilt

The Court "[examines] the words of the Constitution . . . in their historical setting." *United States v. Classic*, 313 U.S. 299, 317 (1941). It assumes that "[t]he Constitution was written to be understood by the voters," *United States v. Sprague*, 282 U.S. 716, 731 (1931), and that words were employed "in their natural sense," *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824), and "used in their normal and ordinary [meaning] as distinguished from technical meaning," *Sprague*, 282 U.S. at 731.

The Framers understood "trial," as used in the Sixth Amendment, to include only the accusatory fact-finding phase. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court explained that a criminal defendant's right to have a jury determine guilt on every element of the charge "extend[ed] down centuries to the common law." *Id.* at 477 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

The *Apprendi* Court defined the parameters of a jury trial by looking to that term's "historical foundation." *Id.* (citing *Gaudin*, 515 U.S. at 510). In doing so, the Court noted that "trial by jury has been understood to require that 'the truth of every accusation, whether preferred in shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . .'" *Id.* (quoting 4 Blackstone, *Commentaries on the Laws of England* 343 (1769)) (emphasis in opinion omitted).

That definition of "trial by jury"—a definition which, again, "extends down centuries," *Apprendi*, 530 U.S. at 477—inherently excludes sentencing. At the Founding, sentencing proceedings were distinct from jury trials. *Id.* (noting that the "substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence.") (quoting J. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, found in *The Trial Jury in England, France, Germany 1700–1900*, at 36–37 (A. Schioppa ed. 1987)). Sentencing for felonies was a *fait accompli* after the jury's verdict. *See Apprendi*, 530 U.S. at 479–80 (noting that "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence") (citing 3 Blackstone 396). And sentencing for misdemeanors was left to the judge's discretion. *See id.* at 480 n.7 (explaining that the common law punishments for misdemeanors were "substantially more dependent

upon judicial discretion"). But in neither case was sentencing a part of the "trial."

Historical sources echo the point. In his *Commentaries*, Blackstone explained that after "the jury have brought in their verdict," the case moves onto "the next stage of criminal prosecution, after trial and conviction are past . . . which is that of judgment." 4 Blackstone 368. This "judgment" stage included judicial pronouncement of the sentence set by law. *Id.* at 369–70. Similarly, an early nineteenth century treatise explained that the formal proceedings of the trial came to a close upon the receipt of the jury's verdict, and only thereafter did prejudgment and sentencing proceedings occur. 1 J. Chitty, *A Practical Treatise on the Criminal Law* 437, 448–97 (Earle, reprint of 1st ed., 1819).

In short, there is no historical foundation for treating sentencing as a subpart of the "trial" and thus subject to the Speedy Trial Clause.

B. The Speedy Trial Clause does not lend itself in either purpose or remedy to application at sentencing proceedings

1. The interests protected by the Speedy Trial Clause are not present in sentencing. The Court has identified three core injuries that result from an unreasonable delay between formal accusation and trial: (1) "oppressive pretrial incarceration," (2) "anxiety and concern of the accused," and (3) "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654

(citing *Barker*, 407 U.S. at 532) (internal quotations omitted).

The primary impetus for the creation of the speedy trial right, which originated in the Assize of Clarendon and Magna Carta, was lengthy or indeterminate incarceration without trial. *Klopfer v. North Carolina*, 386 U.S. 223 (1967). But at the sentencing stage, trial has already occurred; thus, there is no danger of oppressive *pretrial* incarceration. And courts have found that *post-verdict* incarceration of guilty offenders is a necessary and reasonable reality of the justice system. *See, e.g., United States v. Ray*, 578 F.3d 184, 197 (2d Cir. 2009) (noting that "there is no[] risk" of oppressive incarceration because incarceration before sentencing invariably occurs following conviction); *Brooks v. United States*, 423 F.2d 1149, 1153 (8th Cir. 1970) (same).

Similarly, a convict's anxieties about sentencing do not compare to the "cloud of suspicion that hover[s] over one who is presumptively innocent." *Ray*, 578 F.3d at 198 (citation and internal quotations omitted); *see also Brooks*, 423 F.2d at 1153. The convict "may still be under a cloud," but it is no longer merely "a cloud of public accusation[;]" the conviction has transformed it into "a cloud of public guilt." *Ray*, 578 F.3d at 198 (citation and internal quotations omitted). A defendant awaiting trial may hope that acquittal will lift the cloud, but a convict awaiting sentencing knows that the cloud will remain regardless of the penalty imposed.

Nor is the risk of losing exculpatory evidence particularly compelling after a defendant has already been convicted. *Id.* First, even in the pre-trial context, that risk is a relatively minor justification for the Speedy Trial Clause, likely because the Due Process Clause already addresses it. *United States v. MacDonald*, 456 U.S. 1, 8 (1982) (noting that the Speedy Trial Clause is not "primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause."). Second, the presentation of evidence is less critical in sentencing because that proceeding is not an opportunity to attack the conviction. *Cf. Oregon v. Guzek*, 546 U.S. 517, 523–27 (2006) (the Constitution does not grant defendants a right to collaterally attack a guilty verdict at sentencing through the admission of "residual doubt" evidence).

Even if mitigation witnesses' memories may dim over time, that possibility "does not undermine a defendant's ability to argue for leniency at sentencing." *Id.* (citing *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006)). Defendants frequently present mitigating evidence related to the crime at trial and may then use the trial record at sentencing if the original evidence is unavailable. Defendants may also have easier access to alternative sources of mitigation evidence, such as character witnesses, than they do to factual evidence, which often depends on particular memories of particular witnesses. And lost evidence does not always prejudice the defendant; sentencing delays typically impose similar burdens on the

government. *State v. Azania*, 865 N.E.2d 994, 1010, *reh'g granted and decision clarified*, 875 N.E.2d 701 (Ind. 2007); *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 503 (Tex. Crim. App. 2011).

2. Just as the purposes of the Speedy Trial Clause would not be furthered by applying it to sentencing, the harsh and inflexible remedy for Speedy Trial violations—total dismissal of charges—is inappropriate for defendants who have already been found guilty of those charges.

The Court has made clear that "[i]n light of the policies which underlie the right to a speedy trial," "dismissal [of the charges is] . . . ... the only possible remedy." *Strunk*, 412 U.S. at 440 (quotation and citation omitted). In *Strunk*, there was a ten-month delay between the return of the indictment and Strunk's arraignment. *Id.* at 435. The court of appeals found a speedy trial violation, but declined to dismiss the charges as being excessive compensation for the delay. *Id.* This Court rejected as a possible remedy anything less than dismissal, including crediting against the defendant's sentence the amount of delay caused by the Government. *Id.* at 438–39. Illegally withholding a trial from a defendant causes a harm that cannot be remedied by any less severe remedy, but that is not true for delays after a verdict.

In contrast with rights that protect the liberty of the presumably innocent, procedural protections of those found guilty are far less robust. In particular, "[t]he Constitution does not require that sentencing should be a game in which a wrong move . . . means

immunity for the prisoner." *Bozza v. United States*, 330 U.S. 160, 166–67 (1947) (citing *King v. United States*, 98 F.2d 291, 296 (D.C. Cir. 1938)) (citation omitted). The Court has accordingly "rejected the 'doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence.'" *Id.* at 166 (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)).

While it may be plausible for the Court to construct separate remedies for guilt and penalty phase speedy trial violations, the presumptive need to do so undermines the constitutional validity of applying the speedy trial right to sentencing at all. Dismissal of the charges as a remedy for unjustified delay of one's trial is not extreme because it is the only way to vindicate a core, textual attribute of individual liberty. For one thing, there is no way merely to compensate the defendant for time unfairly lost while continuing proceedings to deprive him of liberty. For another, there is no other equally effective way to deter violations of a right understood to be so critical to liberty that it is set forth in express terms in the Sixth Amendment. In contrast, dismissal of charges for unwarranted sentencing delays would indeed be quite extreme, as the government has duly proven the predicate for depriving the defendant of liberty, or property, or both. Understanding dismissal to be an extreme remedy with regard to sentencing delays, but not with regard to trial delays, says something quite substantial about the difference between established

guilt and presumed innocence when it comes to procedural timeliness.

* * *

In short, criminal defendants have different interests at the pre-trial and post-conviction stages. The Speedy Trial Clause was intended to protect the pre-trial interests by preventing presumptively innocent defendants from serving long sentences before they got their day in court—not to permit presumptively guilty defendants to evade punishment for their crimes.

II. Extension of the Speedy Trial Right to Sentencing is Unnecessary Because the Due Process Clause Already Provides a More Appropriate Remedy

A. The Due Process Clause is the established avenue for challenging lengthy pre-sentence detention

There is no reason to stretch the Speedy Trial Clause beyond its intended and logical bounds to provide a remedy for sentencing delays because the Due Process Clause already serves that purpose. When delays in criminal proceedings violate "fundamental conceptions of justice which lie at the base of our civil and political institutions," which "define the community's sense of fair play and decency," such delays can violate due process rights. *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (internal quotations and citations omitted); *see also Doggett*, 505 U.S. at 666 (Thomas, J., dissenting)

("[T]he Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings."); *Sanders*, 452 F.3d at 580 ("[D]ue process . . . imposes an outer limit on the government's window of opportunity to resentence a defendant following an appeal.").

1. The standard of proof for due process violations balances the convict's interest in timely sentencing with the States' interest in protecting justly obtained convictions. The Due Process Clause guarantees protection from "oppressive" delay, *Lovasco*, 431 U.S. at 789; *Sanders*, 452 F.3d at 577, but also conditions relief on a showing that the delay was willful and actually caused the defendant significant prejudice. *Lovasco*, 431 U.S. at 789; *Sanders*, 452 F.3d at 580. While convicts must ultimately bear a heavier burden to obtain their remedy, there will be some situations in which they can carry it.

For example, if the State willfully delayed resentencing, relief may be available under the Due Process Clause. *See Sanders*, 452 F.3d at 581 ("[A] any evidence that the delay was purposeful or due to bad faith would provide strong evidence of a due process violation."); *DeWitt v. Ventetoulo*, 6 F.3d 32, 34—36 (1st Cir. 1993) (holding defendant's due process rights were violated where the State took no action to correct error after defendant's life sentences was suspended in part and then re-imposed six years later). Similarly, relief may be available upon a showing of great prejudice, such as

a delay that extended beyond the end of the maximum possible sentence.

The Due Process Clause also provides a spectrum of remedies more appropriate to the post-conviction sentencing context than the Speedy Trial Clause's singular and severe remedy of dismissal, *Strunk*, 412 U.S. at 440, which in the sentencing context would vitiate the results of a just trial. It allows "courts [to] endeavor to fashion relief that counteracts the prejudice caused by the violation." *Ray*, 578 F.3d at 202 (citing *Burkett v. Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1987) (stating that the "normal remedy for a due process violation is not discharge; rather, a court faced with a violation should attempt to counteract any resulting prejudice demonstrated by a petitioner.")); *see also Brody v. Village Port of Chester*, 345 F.3d 103, 119 (2d Cir. 2003) (finding that the "appropriate remedy" for due process violation "often depends on the stage at which the violation is found").

2. Upon a finding that a sentencing delay constitutes a due process violation, the conviction remains undisturbed, but a court can order alternative remedies. The Second and Sixth Circuits have held that "suspension of the remainder of the sentence" is sometimes appropriate. *Sanders*, 452 F.3d at 580–91; *Ray*, 578 F.3d at 202–03. The Seventh Circuit has found it more appropriate to grant credit time for a delay than to dismiss charges. *Strunk v. United States*, 467 F.2d 969, 972 (7th Cir. 1972), *rev'd by* 412 U.S. 434 (1973). And the First Circuit has prohibited the prosecution from re-

imposing a life sentence after a due process violation. *See DeWitt*, 6 F.3d at 37; *see also Azania*, 865 N.E.2d at 997 (noting the possibility of such a remedy). Other possible remedies, depending on the circumstances of a case, could also include prohibiting an executed sentence or even—in the most extreme cases—dismissal. But whatever the remedy chosen, it should be "tailored to the injury suffered." *United States v. Morrison*, 449 U.S. 361, 364 (1981), and the Due Process Clause permits such tailoring while the Speedy Trial Clause does not.

The Court has similarly preferred such milder remedies to total dismissal in related contexts. *See United States v. Ewell*, 383 U.S. 116, 121 (1966) (noting that application of the Sixth Amendment Speedy Trial Clause would "seriously undercut" policies supporting societal interests in trying cases and careful appellate review); *United States v. Loud Hawk*, 474 U.S. 302, 316–17 (1986) (noting that defendants who avail themselves of interlocutory appeals should not be able to "reap the reward of dismissal for failure to receive a speedy trial"). The States' interest in preserving valid convictions is strong, and convicts' interest in prompt sentencing can be adequately protected without destroying those convictions and granting windfall release.

2. A number of State appellate courts have also concluded that the Due Process Clause is the proper avenue for relief when a sentencing proceeding is unreasonably delayed. *See, e.g., Ball v. Whyte*, 294 S.E.2d 270, 272 (W. Va. 1982) (noting that undue delay in sentence could violate due process

principles); *State v. Drake*, 259 N.W.2d 862, 867 (Iowa 1977) (holding that undue delay in sentencing can be due process violation, though not formulating any standard to measure such violation); *Lee v. State*, 487 So.2d 1202, 1203 (Fla. Dist. Ct. App. 1986) (holding that delay in resentencing should be reviewed for a due process violation in contravention of fundamental fairness). Indiana's Supreme Court has done so as well. *Azania*, 865 N.E.2d at 1005–06 (stating that "the law is clear that delay in criminal proceedings can constitute a due process violation even if a person's speedy trial rights are not violated.") (citations omitted).

Indeed, that is exactly what the Montana Supreme Court did here. *State v. Betterman*, 342 P.3d 971, 978–79 (Mont. 2015). It found the 14-month period between Petitioner's conviction and sentence was an "unacceptable delay." *Id.* at 980. And, while that court found no prejudice to this particular convict, it noted that neither purposeful nor oppressive delay was a prerequisite to relief; instead, it explained, "[n]either factor is to be considered dispositive," and instead they should be "balanced against one another." *Id.* Thus, "[t]hough the reasons for delay may be less than purposeful, or the prejudice caused by the delay less than oppressive," a court may still find a due process violation and grant a convict relief. *Id.*

B. The Due Process Clause is also better equipped to handle delays in resentencing and other atypical cases

As will be true in the mine-run of cases, the defendant in this case challenges a delay in his initial post-trial sentencing. But if the Speedy Trial Clause applies to his case, it must also apply to resentencing proceedings and other more unusual situations where it is even less suitable.

Claims under the Speedy Trial Clause are analyzed under the *Barker* balancing test. Courts consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice. *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972). No one factor is either "necessary or sufficient" to prove a violation, and in particular a showing of prejudice is *not* required. *Id.* at 533; *Moore v. Arizona*, 414 U.S. 25, 26–27 (1973) (per curiam).

In analyzing claims of unconstitutional delay under the Due Process Clause, however, courts consider: (1) the reasons for the delay and (2) the prejudice to the defendant. *Lovasco*, 431 U.S. at 790; *see Sanders*, 452 F.3d at 580 (finding that test applicable to delays in resentencing). Here, the element of "prejudice is . . . necessary"—though not sufficient—to prove a violation. *Lovasco*, 431 U.S. at 790; *see also Ray*, 578 F.3d at 199 (explaining that *Lovasco* requires both showings).

Particularly in the resentencing context, there are many ways sentencing may be delayed without

prejudicing the convict. These harmless delays emphasize the importance of requiring convicts to bring their claims of sentencing delay under a standard that requires a showing of prejudice—like the Due Process Clause.

1. One type of benign delay arises when a defendant prevails on post-conviction review based on a claim of ineffective assistance of counsel at sentencing. In *State v. Azania*, 865 N.E.2d 994 (Ind. 2007), the defendant was convicted for the murder of a police officer in 1981. *Id.* at 997. His conviction and death sentence were affirmed on direct appeal in 1984, but he subsequently won a post-conviction claim relating to his sentence in 1993. *Id.* Upon remand for resentencing, a jury again recommended the death penalty, and that second sentence was again affirmed on direct appeal but then vacated in 2002 by a state post-conviction court. *Id.* At his third sentencing proceeding, 20 years after his conviction, the defendant argued the State should not be able to seek the death penalty because too much time had passed. *Id.* The resentencing court agreed, citing both the Speedy Trial *and* Due Process Clauses, but the Indiana Supreme Court reversed, holding that the Due Process Clause vindicates a convict's interest in timely sentencing and that the State's request for the death penalty did not violate this convict's rights thereunder. *Id.* at 1005, 1010.

Azania exemplifies the lengthy delays inherent to the appellate and post-conviction review process and demonstrates why they are not prejudicial to convicts. And there are many such cases in Indiana,

see, e.g., Woods v. State, __ N.E.3d __, 2015 WL 9478052 *1, *8 (Ind. Ct. App. 2015), *reh'g pending* (remanding for sentencing over twelve years after conviction); *Helsley v. State*, 43 N.E.3d 225, 227 (Ind. 2015) (resentencing eleven years after conviction); *Games v. State*, 743 N.E.2d 1132, 1134 (Ind. 2001) (ordering new capital sentencing proceedings fourteen years after conviction), and in other States. *See, e.g., State v. Clabourne*, 983 P.2d 748, 750–51 (Ariz. 1999) (en banc) (ordering new capital sentencing proceedings eleven years after trial); *Craig v. State*, 685 So. 2d 1224 (Fla. 1996) (remanding for resentencing for the third time, fifteen years after conviction); *State v. Payne*, 199 P.3d 123, 131, 149–50 (Idaho 2008) (ordering post-conviction relief and resentencing eight years after the crime); *Woodward v. State*, 635 So.2d , 807, 809–10 (Miss. 1993) (remanding for resentencing, following defendant's conviction and sentence six years earlier); *State v. Mantich*, 842 N.W.2d 716, 718–19, 732 (Neb. 2014) (remanding for resentencing twenty years after sentencing, based on *Miller v. Alabama*, 132 S. Ct. 2455 (2012)); *Commonwealth v. Smith*, __ A.3d __, 2015 WL 9284136, slip op. at 2–3 (Penn. 2015) (finding no prejudice following a seventeen-year delay between conviction and resentencing); *Adkins v. State*, 911 S.W.2d 334, 340–41 (Tenn. 1994) (remanding for resentencing for the fourth time fifteen years after conviction).

A convicted defendant who chooses to pursue federal habeas relief can expect an even longer "delay" before receiving a "final" sentence. One study showed the average time from state judgment

to federal habeas corpus filing is 6.3 years for non-capital cases and 7.4 years for capital cases. Nancy J. King et al., *Final Technical Report: Habeas Litigation in the U.S. District Courts—An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 (2007) (http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf) [hereinafter King, *Habeas Litigation*]. Petitioners can expect processing times of 11.5 months for non-capital cases and 37.9 months for capital cases. *Id.* at 7. Another study showed the average judgment-to-habeas time was almost five years, Roger A. Hanson, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 6–7, 12 (1995) (http://bjs. gov/content/pub/pdf/fhcrcscc.pdf) [hereinafter Hanson, *Federal Habeas Corpus Review*], and the median processing time was six months, with 10 percent of cases taking over two years to resolve. *Id.* at 19.

But as the review process gets longer, the States' interests become that much stronger. Habeas relief is most frequently by "serious offenders who are incarcerated long enough to complete available State direct appeals and collateral challenges." *Id.* at 12–13. Most have been convicted of violent crimes; one study found that 23 percent were convicted of homicide, 39 percent of other violent crimes (rape, sexual abuse, robbery, kidnapping), and 27 percent of burglary, theft, drug trafficking, or possession or weapon offenses. *Id.* at 11. And more than one in five had been sentenced to life imprisonment (defined as life with parole, life without parole, and

life plus additional years). *Id.* at 11. In fact, the more serious the offense, the longer the federal court took to resolve the petition. *Id.* at 25. In sum, due to the severity of the crimes involved, these cases are often the most "high stakes" criminal litigation States are involved in. *Id.* at 13.[1]

The States are not at fault for these delays, yet under the petitioner's logic, they should nonetheless bear the double burden of relitigating the sentence *and* defending against a "speedy sentencing" claim. Such a result is simply unjust.

2. Non-prejudicial delays sometimes arise due to contemporaneous prosecutions or even the convict's own illegal escape from custody. In *Brooks*, for example, the defendant's federal sentencing was deferred for over seven months until the completion of a simultaneous state criminal case. *Brooks v. United States*, 423 F.2d 1149, 1151 (8th Cir. 1970). The Eighth Circuit noted that deferral "was not

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[1] Ineffective assistance of counsel claims are particularly common and often create *Azania*-type scenarios. One study found that petitioners raised such claims in 81 percent of capital cases and 50 percent of non-capital cases. King, *Habeas Litigation* at 5; *see also* Hanson, *Federal Habeas Corpus Review* at 14 (finding that 25 percent of overall habeas petitioners raised such claims). And they have some of the longest processing times, Hanson, *Federal Habeas Corpus Review* at 24 (table comparing average number of days by claim raised), likely because they are 8 percent more likely to succeed. King, *Habeas Litigation* at 10.

unusual . . . [t]here have been many instances where courts have postponed sentencing" in similar situations. *Id.* (citing cases). In *State v. Johnson*, 363 So.2d 458 (La. 1978), the convict escaped while awaiting sentencing in Louisiana and was subsequently convicted and imprisoned in Michigan. *Id.* at 459. Louisiana repeatedly issued detainers and inquired if the defendant would waive extradition; however, it was not until the defendant was paroled seven years later that he was extradited and returned to Louisiana. *Id.*

In all of these situations, the Due Process Clause's requirement of prejudice protects the State from being penalized when the delay is not its fault or in any event non-prejudicial. *Lovasco*, 431 U.S. at 790; *cf. State v. Roman*, __ A.3d __, 320 Conn. 400, slip op. at 9 (Conn. 2016) ("When a delay may be ascribed to an individual failure rather than an institutional failure, the defendant must show actual prejudice"). It prevents convicts from abusing the Sixth Amendment to reap disproportionate relief. *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (noting that Sixth Amendment remedies should "not grant a windfall to the defendant" or "needlessly squander the considerable resources the State properly invested in the criminal prosecution."). Though not every showing of prejudice is sufficient to establish a due process violation, *Lovasco*, 431 U.S. at 789–90, in light of the varied causes for delay between trial and ultimate sentencing, the Due Process Clause best balances the interests of both convicts and the State.

III. In Addition to the Due Process Clause, States Are Already Addressing the Burdens of Delayed Sentencing in Other Ways

In many States, the Due Process Clause is only one of several protections against unreasonable sentencing delays. Those protections come in the form of judge-made law as well as statutes and rules.

The Indiana Supreme Court has effectively integrated the second element of the *Barker* test—the cause of the delay—into its analysis of sentencing delays in order to account for the State's interest in preserving the conviction while still protecting convicts against unreasonable delay. In *Azania*, where two successful post-conviction petitions delayed the convict's resentencing proceeding for over 20 years after his conviction, the Indiana Supreme Court rejected "the default position in *Barker* . . . that any delay that is not specifically attributable to the defendant is laid at the doorstep of the State." 865 N.E.2d at 1003. Instead, "with respect to any period of time during which the defendant has the burden of prosecuting" "either an appeal or a petition for collateral review," the defendant "bears the burden of demonstrating some action on the part of the State that has delayed the defendant's appeal or collateral proceeding." *Id.*

Accordingly, in Indiana, as in many other States, a defendant raising an unreasonable delay in sentencing has an avenue for relief—but under a more appropriate standard than the Speedy Trial Clause requires.

Several States have promulgated rules and statutes preventing undue sentencing delays. *See, e.g.*, Colo. Crim. Proc. R. 32 (b)(1) ("Sentence shall be imposed without unreasonable delay."); Fla. Crim. Proc. R. 3.720 ("As soon as practicable after the determination of guilt ... the sentencing court shall order a sentencing hearing."); Kan. Stat. Ann. § 22-3424 (sentence to be "pronounced without unreasonable delay."); La. Code Crim. Proc. Art. 874 ("Sentence shall be imposed without unreasonable delay."); Me. Crim. Proc. R. 32(a)(1) ("Sentence shall be imposed without unreasonable delay"); Mo. Crim. Proc. R. 29.07(b)(1) ("Sentence shall be imposed without unreasonable delay."); Mont. Code § 46-18-115 ("the court shall conduct a sentencing hearing, without unreasonable delay"); N.Y. Crim. Proc. Law § 380.30 ("Sentence must be pronounced without unreasonable delay."); Tenn. Code § 40-35-209 ("the court shall conduct a sentencing hearing without unreasonable delay, but in no event more than forty-five (45) days after the finding of guilt"); Wash. Rev. Code § 9.94A.500(1) ("The sentencing hearing shall be held within forty court days following conviction.").

In sum, the States are both willing and capable of addressing unreasonable sentencing delays on their own, either through the Due Process Clause or other state remedies. By clarifying that the Due Process Clause is the proper vehicle for vindicating such claims, the Court will ensure States retain the necessary flexibility to address these fact-specific claims on a case-by-case basis.

* * *

In general, States and their trial courts control the timing of jury trials concerning the guilt of the accused. Accordingly, the "severe remedy," *Strunk*, 412 U.S. at 439, of dismissal for Speedy Trial Clause violations is appropriate in that context. But sentencing proceedings, particularly resentencing, may reasonably occur decades after the original conviction. The Court need not extend the Speedy Trial Clause to these scenarios because the Due Process Clause already sufficiently addresses them. Such an extension would also ignore the text and original understanding of the Speedy Trial Clause, unduly burden the administration of justice, and unjustifiably reverse otherwise valid criminal convictions.

CONCLUSION

The Court should affirm the judgment of the Supreme Court of Montana.

Respectfully submitted,

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